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Supreme Court, U.S.
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No. 93-11

In The

Supreme Court of the United States

October Term, 1993

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA, by and through its Tax Commissioner, Robert E. Hanson,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 42 U.S.C. § 1988 applies to an action brought by the state under the state's declaratory judgment act to determine the constitutionality of applying a state tax statute to a corporation that has not paid or been assessed taxes under the statute.

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STATEMENT OF THE CASE

In July 1989 the State of North Dakota through its State Tax Commissioner ("Tax Commissioner") requested that Quill Corporation ("Quill") register as a retailer and begin collecting North Dakota use tax on its sales to North Dakota customers. App. 119-20. Quill refused. App. 121-22. The Tax Commissioner then initiated a declaratory action in district court asking the court to determine if Quill could be required to comply with North Dakota's sales and use tax statute. App. 116-19. Quill counterclaimed for declaratory relief under North Dakota law as well as for relief under 42 U.S.C. §§ 1983 and 1988. App. 123-33.

The North Dakota district court determined that under the rule expressed in *National Bellas Hess, Inc. v. Department of Revenue,* 386 U.S. 753 (1967), the Tax Commissioner could not impose a use tax collection duty on Quill. App. 111-15. The district court dismissed Quill's claim for attorney's fees under sections 1983 and 1988. App. 115.

The North Dakota Supreme Court reversed the district court's decision. App. 68-107. Because of its disposition of the case, the court found it unnecessary to address Quill's section 1983 counterclaim. App. 106.

The action was subsequently heard by this Court, which held that requiring Quill to register as a retailer and collect North Dakota use tax on its sales to North Dakota customers would not violate the Due Process Clause but would violate the Commerce Clause. App. 24-66.

On remand, the North Dakota Supreme Court vacated that portion of its original opinion reversed by this Court and affirmed the judgment of the district court. App. 22-23. Quill petitioned for rehearing. App. 2. The North Dakota Supreme Court granted Quill's petition for rehearing on the issue of whether Quill is entitled to attorney's fees under 42 U.S.C. §§ 1983 and 1988 given the circumstances in this case. App. 3.

On rehearing, Quill conceded that its section 1983 claim would be barred in state court by the North Dakota Supreme Court's earlier decision in *Linderkamp v. Bismarck Sch. Dist. No. 1*, 397 N.W.2d 76 (N.D. 1986). App. 5. In *Linderkamp* the North Dakota Supreme Court held that a taxpayer may not bring a section 1983 action in state court in matters relating to state taxation where an adequate state remedy is available. *Linderkamp*, 397 N.W.2d at 80. Quill also conceded on rehearing that North Dakota's Declaratory Judgment Act, N.D. Cent. Code ch. 32-23, provided an adequate state remedy. App. 5. Quill argued, however, that *Linderkamp* was abrogated by this Court's decision in *Howlett v. Rose*, 496 U.S. 356 (1990). App. 5. Quill further contended that the state court was required to hear its counterclaim even though its claim would be barred in federal court by the Tax Injunction Act, 28 U.S.C. § 1341, because Quill had a plain, speedy, and efficient remedy available at state law. App. 5.

The North Dakota Supreme Court upheld the district court's dismissal of Quill's section 1983 counterclaim and denied attorney's fees. App. 17. The court stated that its holding was consistent with the Supreme Court's decisions in *Howlett*, *Felder v. Casey*, 487 U.S. 131 (1988), and

Wilson v. Garcia, 471 U.S. 261 (1985), as well as its own decision in *Linderkamp*. App. 5-12. The court wrote:

> We do not read *Howlett* and earlier Supreme Court cases to require state courts to entertain § 1983 actions challenging state tax administration when such actions would be barred in federal court. *Howlett*, *Felder*, and *Wilson* recognize that Congress intended that § 1983 be given a uniform application within each state. Accordingly, we read those cases as holding only that state rules that are outcome-determinative, in a manner inconsistent with federal law, will be violative of the Supremacy Clause. Application of the *Linderkamp* holding in this case to preclude a § 1983 action in state court that would be barred in federal court by the Tax Injunction Act is consistent with *Howlett*, *Felder*, and *Wilson*, and creates a uniform result in state and federal court.

App. 12.

The court then clarified that the *Linderkamp* rule "was based exclusively upon federal law and policy." App. 13. The court stated that its decision

> [recognizes] that the proscriptions of the Tax Injunction Act are based at least in part upon deference to state remedial schemes[. This] leads to the conclusion that a state court § 1983 action, which applies a federal remedial statute for alleged violations of federally-created rights, is no less of a burden upon the state remedial scheme than would be a § 1983 action brought in federal court.

App. 14 (*quoting Linderkamp*, 397 N.W.2d at 80).

REASONS FOR DENYING THE WRIT

I. BECAUSE THE NORTH DAKOTA SUPREME COURT DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER STATE COURTS OR DECISIONS OF THIS COURT, QUILL'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A. The Decision Below Does Not Conflict With Decisions Of Other State Courts.

A careful reading of the facts and analyses in the state court decisions upon which Quill relies shows there is no true conflict among the states as to whether a section 1983 claim may be brought in state court under the circumstances presented in this case.

The primary case that Quill cites as conflicting with the North Dakota Supreme Court decision below is *Bloomingdale's by Mail, Ltd. v. Huddleston*, 848 S.W.2d 52 (Tenn. 1992), *cert. denied*, 61 U.S.L.W. 3850 (U.S. June 21, 1993). *See Cert. Pet.* at 9-10.

In *Bloomingdale's* the Tennessee Supreme Court applied the holding in *Howlett v. Rose*, 496 U.S. 356 (1990), and decided that federal law prohibited any state law limitations on the award of attorney's fees in section 1988 cases. *Bloomingdale's*, 848 S.W.2d at 52. In that case the Tennessee Department of Revenue had issued an assessment of sales and use taxes to Bloomingdale's by Mail, Ltd. ("Bloomingdale's"). *Id.* at 56. As permitted by Tennessee law, Bloomingdale's then filed a complaint in state court to set aside the assessment. *Id.* The parties agreed that the constitutionality of the assessment was resolved by this Court's decision in *Quill Corp. v. North Dakota*, 112 S. Ct. 1904 (1992). *Bloomingdale's*, 848 S.W.2d at 52.

The issue decided in *Bloomingdale's* was whether state or federal law governed the award of attorney's fees in a case brought by a taxpayer to set aside a tax assessment. *Id.* at 53; *see also id.* at 57. The court held that section 1988 governed the award of attorney's fees and the Tennessee statute that put a limit on the award of attorney's fees could not be applied. *Id.* at 56-57. In contrast, the issue presented to and decided by the North Dakota Supreme Court was whether the state court was required to hear Quill's section 1983 counterclaim when no assessment had been made.

The Tennessee Supreme Court in *Bloomingdale's* recognized the distinction between the issue decided there and the issue decided below. A year before deciding *Bloomingdale's,* the Tennessee Supreme Court held that a state court did not have subject matter jurisdiction over a section 1983 claim brought by a taxpayer to challenge a state tax statute. *L.L. Bean, Inc. v. Bracey,* 817 S.W.2d 292 (Tenn. 1991). *L.L. Bean* was factually similar to this case in that the taxpayer had not received an assessment and had not paid any tax. *Id.* at 293. The *Bloomingdale's* court found this factual difference significant, stating:

> The issue in *L.L. Bean* was whether a chancery court had subject matter jurisdiction regarding a claim brought under 42 U.S.C. § 1983. The taxpayer in that case had not received an assessment, nor had it paid any taxes that it contested. . . .
>
> Unlike the taxpayer in *L.L. Bean,* Bloomingdale's by Mail, Ltd., had received an assessment and was properly before the chancery court. . . .

Bloomingdale's, 848 S.W.2d at 56. The *Bloomingdale's* court did not overrule *L.L. Bean*. Instead, the court concluded that the *L.L. Bean* holding was consistent with its decision. *Id.*

Given the similarity between *L.L. Bean* and the North Dakota Supreme Court's decision, and the fact that even the Tennessee Supreme Court in *Bloomingdale's* found no conflict between the *L.L. Bean* and *Bloomingdale's* decisions, Quill's reliance on *Bloomingdale's* to establish a conflict is misplaced.

Similarly, a review of the other cases Quill cites in support of its argument that a conflict exists among the state high courts reveals that this alleged conflict is illusory. Quill claims that there are six additional cases in which state courts of last resort have considered whether their courts must hear section 1983 claims in state tax cases, with four courts[1] deciding the question in the negative and two courts deciding in the affirmative. *Cert. Pet.* at 10. Quill's discussion of these cases ignores factual distinctions and oversimplifies or misrepresents the courts' holdings.

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[1] In fact, more than four state courts have held that state courts are not required to hear section 1983 claims in state tax cases unless the taxpayer has exhausted available administrative remedies. *See McManus v. Department of Revenue and Finance*, 499 N.W.2d 726 (Iowa 1993); *Dean v. State*, 826 P.2d 1372 (Kan.), *cert. denied*, 112 S. Ct. 2941 (1992); *Nutbrown v. Munn*, 811 P.2d 131 (Or. 1991), *cert. denied*, 112 S. Ct. 867 (1992); *Hogan v. Musolf*, 471 N.W.2d 216 (Wis. 1991), *cert. denied*, 112 S. Ct. 867 (1992). These cases arose out of circumstances in which state taxes had been assessed or paid. *McManus*, 499 N.W.2d at 727; *Dean*, 826 P.2d at 1374-75; *Nutbrown*, 811 P.2d at 132-33; *Hogan*, 471 N.W.2d at 217.

Quill cites *Allison v. Board of County Comm'rs of Johnson County, Kansas*, 737 P.2d 6 (Kan. 1987), and *Marx v. Truck Renting and Leasing Ass'n, Inc.*, 520 So.2d 1333 (Miss. 1987), claiming that those decisions hold that the Tax Injunction Act does not permit state courts to refuse to entertain section 1983 challenges to state tax statutes. *Cert. Pet.* at 10. This is not an accurate statement of the holdings in those two cases. The basis for the decision in *Allison* was the inadequacy of the remedy available to the complaining taxpayers. *Allison*, 737 P.2d at 12. In *Marx* the court did not reach the issue of whether a state court must take jurisdiction of section 1983 claims in state tax cases, writing: "We need not consider whether the courts of this State must take and adjudge every § 1983 claim tendered to them. Today's case arises in the context of a trial court adjudication which did decide the § 1983 claim." *Marx*, 520 So.2d at 1346.

Quill claims the four following decisions conflict with *Allison* and *Marx*: *Zizka v. Water Pollution Control Auth.*, 490 A.2d 509 (Conn. 1985); *Backus v. Chilivis*, 224 S.E.2d 370 (Ga. 1976); *Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo. 1985) (en banc); *Spencer v. South Carolina Tax Comm'n*, 316 S.E.2d 386 (S.C. 1984), *aff'd*, 471 U.S. 82 (1985). All four cases are distinguishable from *Allison* and *Marx* as well as the instant case.

All four involved claims for refund of taxes paid or assessed under an unconstitutional taxing scheme. *Zizka*, 490 A.2d at 510-11; *Backus*, 224 S.E.2d at 372-73; *Stufflebaum*, 691 S.W.2d at 271; *Spencer*, 316 S.E.2d at 387. In this case, no taxes were paid or assessed. Further, at least three of these cases concerned whether a taxpayer must

exhaust available administrative remedies before bringing a section 1983 claim in a state court. *Zizka*, 490 A.2d at 512-14; *Backus*, 224 S.E.2d at 373-75; *Stufflebaum*, 691 S.W.2d at 271-72. The exhaustion issue is irrelevant when no tax has been paid or assessed.

The only similarity between the North Dakota Supreme Court decision and these four state courts' decisions is that all these courts recognize that a section 1983 action challenging a state tax system in state court is no less intrusive to a state's fiscal operations than an identical challenge in federal court.

Because the decision below does not conflict with the decision of any other state court of last resort, review by this Court is not warranted and certiorari should be denied.

B. The Decision Below Does Not Conflict With *Howlett v. Rose* Or Other Decisions Of This Court.

Contrary to Quill's assertion, the decision below does not conflict with *Howlett v. Rose*, 496 U.S. 356 (1990).

Howlett involved a section 1983 claim brought by a former high school student against a school board and three school officials alleging a violation of the student's constitutional rights. *Id.* at 359. The school board argued it was immune from suit under Florida's sovereign immunity law. *Id.*

This Court granted review and described the issue presented as follows:

> The question in this case is whether a state-law defense of "sovereign immunity" is available to a school board otherwise subject to suit in a Florida court even though such a defense would not be available if the action had been brought in a federal forum.

Id. at 358-59. The Court determined that the school board could not assert the sovereign immunity defense when the defense would not be available in federal court. *Id.*

The Court did not hold, as Quill asserts, that state court jurisdiction over section 1983 claims is mandatory absent congressional ouster or a valid excuse. *Howlett* stands for the proposition that plaintiffs must be as free to bring section 1983 claims in state court as in federal court. This rule was created to "assure that the outcome of federal causes of action would be the same, regardless if decided in a state or federal forum." *Greenwich Township v. Murtagh,* 601 A.2d 1352, 1355 (Pa. Commw. Ct.), *appeal granted,* 606 A.2d 904 (Pa. 1992).

The disposition of Quill's section 1983 claim here is the same as it would have been if Quill had attempted to bring a section 1983 action in federal court. Quill could not have brought a section 1983 action in federal court to challenge the constitutionality of the North Dakota tax statute at issue in this litigation. *See Fair Assessment in Real Estate Ass'n, Inc. v. McNary,* 454 U.S. 100 (1981). Quill would be required to pursue its claim through its plain, adequate, and complete remedies at state law.[2] *Id.* at 116.

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[2] Quill concedes that the state declaratory judgment act provides a plain, speedy, and efficient remedy under state law and that a section 1983 action in federal court would be barred by the Tax Injunction Act. App. 5.

This is the same result the North Dakota Supreme Court reached below.

The case presented here is more like *Will v. Michigan*, 491 U.S. 58 (1989), than *Howlett*. *Will* established that the state and arms of the state, which enjoy Eleventh Amendment immunity from section 1983 suits for damages in federal court, are also exempt from section 1983 suits for damages in state court. *See Howlett*, 496 U.S. at 365. As a result of the decision in *Will*, the outcome of a suit for damages against the state and state officials in their official capacities is the same in state and federal court. In *Howlett* the defendants were a school district and local officials who could have been sued under section 1983 in federal court. *Howlett*, 496 U.S. at 359, 365-66. The Florida sovereign immunity law struck down in *Howlett*, therefore, would have resulted in different outcomes in state and federal courts. In contrast, the North Dakota Supreme Court's decision ensures consistent outcomes in state and federal court.

The North Dakota Supreme Court decision promotes the principle of uniform application of section 1983 in state and federal courts; that uniformity is the foundation for this Court's decisions in *Howlett*, *Will*, *Fair Assessment*, *Felder v. Casey*, 487 U.S. 131 (1988), and *Wilson v. Garcia*, 471 U.S. 261 (1985).[3] The decision below applies this

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[3] The decision below also does not conflict with *Dennis v. Higgins*, 111 S. Ct. 865 (1991). The only issue addressed in *Dennis* was whether suits for violations of the Commerce Clause may be brought under section 1983. *Id.* at 867. The majority opinion in *Dennis* does not discuss or decide whether the state court in *Dennis* properly assumed jurisdiction over the section 1983 claim. *See id.* at 880 (Kennedy, J., dissenting).

principle to the state tax challenge in this case and is consistent with the holding and rationale of *Howlett* and related Supreme Court decisions.

II. THIS CASE IS NOT THE APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED BY THE PETITIONER.

In its petition for writ of certiorari, Quill has phrased the question presented as follows:

> Does the Tax Injunction Act, 28 U.S.C. § 1341, prohibit a state court of competent jurisdiction from entertaining a cause of action under 42 U.S.C. § 1983 in a case involving state taxation?

Cert. Pet. at i. Granting certiorari in this case would not answer this question.

The Tax Commissioner has never argued and the North Dakota Supreme Court did not find that the Tax Injunction Act applies to state court proceedings. Although the principles that underlie the Tax Injunction Act provided support for the North Dakota Supreme Court's decision, the primary basis for that decision was the policy of uniformity in the application of federal law in state and federal courts. *See* App. 4-5, 10-14. This case, therefore, does not present the question of whether the Tax Injunction Act prohibits a state court from entertaining a section 1983 claim in a case involving state taxation.

An additional reason for denying the petition is that this case is not as procedurally straightforward as Quill would have the Court believe. Quill did not initiate this action. After Quill refused to register as a retailer and

begin collecting North Dakota use tax on sales made to its North Dakota customers, App. 119-22, the Tax Commissioner filed a declaratory judgment action asking the district court to determine whether enforcement of the statute against Quill would violate the United States Constitution, App. 116-19. Quill answered and as an affirmative defense alleged that the state tax statute was unconstitutional as applied to Quill. App. 123-33. Quill also counterclaimed, raising these same allegations of unconstitutionality to claim attorney's fees under sections 1983 and 1988. *Id.*

No lower court has reached the issue of whether Quill's counterclaim stated a section 1983 cause of action. Disposition of Quill's section 1983 counterclaim on the merits was never necessary because the constitutionality of applying the North Dakota tax statute to Quill was resolved as part of the state declaratory judgment proceeding and appeals.[4] Deciding whether Quill is entitled to attorney's fees under section 1988, thus, would be premature.

These circumstances further demonstrate that this case is not ripe for review. A claim of a constitutional

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[4] As Quill conceded, the remedy provided by North Dakota's Declaratory Judgment Act is a plain, speedy, and efficient state law remedy. App. 5. Quill received the opportunity to present all constitutional claims and a determination that North Dakota could not impose a use tax collection obligation on Quill, i.e., all the relief that could be granted. *See Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981). The only other advantage Quill sought by filing the section 1983 counterclaim was the possibility that, if successful, attorney's fees could be awarded pursuant to section 1988.

violation is not ripe until there has been an actual, concrete injury. *See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-94 (1985). Because no tax assessment has been made or taxes paid, Quill has not suffered any property deprivation or other constitutional injury giving rise to a section 1983 cause of action.

Also, Quill concedes that a taxpayer must exhaust administrative remedies before bringing a section 1983 claim in state court. *Cert. Pet.* at 14. Yet, Quill asks the state court to exercise jurisdiction even before an assessment has been made. An assessment is necessary before a taxpayer is entitled to an administrative proceeding. *See* N.D. Cent. Code §§ 57-39.2-15 and 57-39.2-16; *see also* N.D. Cent. Code ch. 28-32. It is inconsistent to both acknowledge that there is an exhaustion requirement and assert that state remedial proceedings can be avoided just by filing a section 1983 claim anytime before a constitutional deprivation has occurred.

Finally, the unique procedural posture of the parties in this case could result in any decision by this Court being applicable only to the parties in this litigation. Courts have recognized that a defendant asserting a section 1983 claim raises special questions. *See Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983) ("[A] prevailing defendant may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant."); *State v. Maine State Trooper's Ass'n*, 491 A.2d 538 (Me.), *appeal dismissed*, 474 U.S. 801 (1985) (a counterclaim does not convert a successful section 1983 claimant into a plaintiff for determining the standard under which attorney's fees are to be awarded

under section 1988). A decision here would not necessarily be applicable to suits in which taxpayers were plaintiffs in state court actions or even to cases in which taxpayers actually had been assessed or paid taxes.

Accordingly, the case at bar does not squarely raise the issue Quill asks this Court to resolve, or provide an appropriate case in which to consider that issue.

CONCLUSION

For the reasons set forth above, the State of North Dakota respectfully requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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